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International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

Comments and observations received from Governments

Report of the Secretary-General

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I. Introduction

1. On 12 December 2000, the General Assembly adopted resolution 55/152, entitled "Report of the International Law Commission, on the work of its fifty-second session". In paragraph 3 of the resolution, the Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) as referred to the Drafting Committee.[1]

2. As at 21 March 2001, a reply had been received from the United Kingdom of Great Britain and Northern Ireland. The comments and observations relating to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) are reproduced in section II below, in an article-by-article manner. Additional replies received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments

United Kingdom of Great Britain and Northern Ireland

General remarks

The United Kingdom reiterates its general satisfaction with the overall direction of the work of the Commission and its Special Rapporteur on this topic, and presents its observations in that context.

Title

The United Kingdom has welcomed the conciseness of the new title, "Convention on the Prevention of Significant Transboundary Harm", and endorsed the deletion of the expression "injurious consequences of acts not prohibited by international law". It could be further improved by the deletion of the word "significant", this word being an element of definition best left to the body of the text. The reference to "hazardous activities" should remain deleted, as it does not reflect the text of article 1. It would however be desirable to add to the title some succinct reference to the type of harm covered by the convention. The Commission may wish to consider the following possibility (with or without the bracketed words):

> "The [Framework] Convention on Prevention of Transboundary Harm caused by Activities involving Risk [of Such Harm]"

If the final instrument is intended to be adopted as a framework convention, it would be desirable to include the word "framework" in the title. However, the text as currently drafted seems to be in the nature of a free-standing convention rather than a framework. To turn it into a framework convention would require some modest adaptations to the body of the text, for example to accommodate other agreements and/or unilateral declarations within its framework.

Article 1

The United Kingdom refers to its detailed written comments on article 1 in its submission of 24 March 2000 (A/CN.4/509, p. 8). Since it is now proposed to adopt the draft articles in the form of a binding instrument, the United Kingdom considers it essential that the scope of the articles be more precisely defined, or at least that the instrument contain a mechanism for generating the necessary definition. Three possible ways of providing for clarification of the activities covered were suggested in the previous submission. These could be employed singly or in combination, for example, by setting out a minimum core of activities to be covered in a list; by obliging States parties to designate unilaterally further activities within their territory, jurisdiction or control which involve risk of causing significant transboundary harm; and by providing for the more detailed designation of activities within the scope of the convention by specific agreements between neighbouring or regional States.

The United Kingdom considers that the provision of mechanisms such as those suggested above for defining the activities to which the articles apply would fit well with the concept of a framework convention.

[1] The text of the draft articles may be found in the report of the Commission on the work of its fifty-second session, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. VIII.B.3, para. 721.

Articles 2, 8 [9] and 9 [10]: "States likely to be affected"

The United Kingdom has come to the view that the expression "States likely to be affected" and its definition in subparagraph (e) of article 2 are not entirely consistent with the expression "risk of causing significant transboundary harm" and its definition in subparagraph (a). Where the "risk involving transboundary harm" constitutes a low probability of causing disastrous harm there will be no public and no State *likely* to be affected. The concept of risk as defined in subparagraph (a) is, and should be, central to the structure of the articles.

To render subparagraph (e) consistent with subparagraph (a), it could be recast to refer to the State in the territory of which there is a risk of significant transboundary harm occurring. That State might be more aptly referred to as the "potentially affected State".

As drafted, article 8 only requires notification of the public *likely to be affected*, and article 9 only requires notification of States *likely to be affected*. Likewise, articles 10 and 11 apply to the "States concerned", which is defined in article 2 (f) as including "States *likely to be affected*", but this expression does not include all States which are *at risk*. It would follow that articles 8, 9, 10 and 11 do not apply to some activities which are within the scope of the draft convention. In the opinion of the United Kingdom, these articles should apply to all such activities.

The United Kingdom believes that if the modification to subparagraph (e) of article 2 suggested above were made, consistency could then be achieved by referring to potentially affected States and the public potentially affected throughout the text, in place of references to the likelihood of being affected.

Article 7 [8]

The United Kingdom welcomes the replacement of the word "evaluation" by the word "assessment" in the body of this article. However, there seems still to be some inconsistency between the title of this article and the text. An "environmental impact assessment", as referred to in the title, must necessarily involve assessment of the entire environmental impact of a proposed activity, within and outside the territory of the State of origin. The obligations in article 9 would only apply in the event that the assessment were to indicate a risk of causing significant transboundary harm, but the assessment cannot realistically be carried out only in relation to the transboundary dimension.

The United Kingdom would prefer this article to require a decision to authorize an activity to be based on an assessment of the possible impact of the proposed activity on the environment, including the possible transboundary harm.

If, however, the text of the article remains as drafted, the title should be modified lest the impression be given that the assessment referred to would amount to an "environmental impact assessment" in the sense in which that term is normally used, for example, in principle 17 of the Rio Declaration. The title could, for example, be qualified by adding the word "Transboundary" at the beginning, or substituting the word "transboundary" for the word "environmental".

Relationship between articles 3, 10 [11] and 11 [12]

The United Kingdom remains concerned that the concept of solutions based on an equitable balancing of interests might be interpreted in a way which undermines the duty of prevention set out in article 3. For example, it might be understood as implying that some potential solutions regarding the implementation of the duty in article 3 are unacceptable or inequitable.

The United Kingdom is in agreement with the Special Rapporteur's explanation of the mutually interacting relationship between these articles, as set out in the paragraph in bold print beginning "N.B." at the end of the annex to his third report (A/CN.4/516). The United Kingdom considers it necessary to add a clarification to this effect to the text of the convention, in order to eliminate the present ambiguity. The third and fourth sentences of the Special Rapporteur's explanation could lend themselves particularly well to insertion into the text of article 10.

The precautionary principle, polluter-pays and sustainable development

The United Kingdom has already expressed disappointment that the revised text does not take greater account of the principles of precautionary action, that the polluter should pay and that development should be sustainable. States should take these principles into account when making decisions on

prior authorization of activities involving risk and when consulting on an equitable balancing of interests. The principles would be most effective if incorporated explicitly into the operational part of the convention text. For example, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity not only sets out a preambular reaffirmation of the precautionary approach contained in principle 15 of the Rio Declaration, but also spells out in the operational part of the text how this approach is to be applied in the context of the Protocol (articles 10 and 11). The Commission might likewise consider incorporating reference to the above principles into one or more of the relevant operational articles of the present convention. The United Kingdom believes that adherence to these principles should not be taken for granted.